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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

14 Cr. 305 KMK

5 BRIAN FANELLI,

6 Defendant.

7 -----x

8 July 27, 2015

12:15 p.m.

9 White Plains, N.Y.

10 Before:

11 HON. KENNETH M. KARAS,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

United States Attorney for the
Southern District of New York

15 ANDEN CHOW

16 ANDREW GOLDSTEIN

Assistant United States Attorneys

17 MICHAEL BURKE

18 Attorney for Defendant

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1 THE COURTROOM DEPUTY: United States v. Brian Fanelli.
2 Will counsel please state their appearances.

3 MR. CHOW: Anden Chow for the government. With me at
4 counsel table is Andrew Goldstein from our office.

5 MR. BURKE: Michael Burke for Mr. Fanelli.

6 THE COURT: Good afternoon. Please be seated. All
7 right, Mr. Burke, my understanding is that your client is going
8 to enter a plea of guilty to the third count in the indictment,
9 is that right?

10 MR. BURKE: That's right, your Honor. There was an
11 issue that the government raised with me for the first time
12 right before we began the proceeding, about a quarter to twelve
13 and I'd like to address that at sidebar if we may. We are
14 prepared to move forward on a plea to Count 3, but there's a
15 issue as to the effect of that plea what their stated position
16 was going to be as to detention, and where we may be, because I
17 don't want to move forward on the plea -- I was under the
18 belief based on the discussions I had with the government that
19 he would not be going in today and they'd consent to him
20 remaining out and the conditions remaining in place upon an
21 entry of the guilty plea. And I want to discuss that with the
22 Court if we can or we can do it on the record.

23 THE COURT: I'm loath to do anything in a criminal
24 case off the record. Why do we need to do it at the sidebar?

25 MR. BURKE: What I'd like to present to the Court is

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1 when we spoke late Friday the government's position was that he
2 would not need to be prepared to go in today. I do believe
3 that there are extraordinary circumstances present here.

4 THE COURT: The government has changed its position?

5 MR. BURKE: The position has waffled a bit.

6 THE COURT: All right, government.

7 MR. CHOW: I don't believe our position has waffled.

8 From the beginning we stated that we would not oppose a motion
9 for the defendant to be out on bail pending sentencing. What
10 we did bring to Mr. Burke's attention earlier today is that we
11 explained to him the statutory regime that governs in this
12 circumstance and we wanted to make sure that he was aware of
13 what the standard was in terms of what the Court needed to find
14 in order for the defendant to be continued on bail pending his
15 sentence.

16 MR. BURKE: I guess from what I see, as far as the
17 change of position, it is consenting versus not opposing which
18 I think are different. From the government's perspective,
19 that's great, they're not going to oppose. The information was
20 that he should not be prepared to go in on Monday if we entered
21 a plea. I know what the statutory regime is and what's
22 required for the Court to find. I do think we can establish
23 that. But if the Court is to find that I don't establish that
24 then my client would have to go in today and he's not prepared
25 to do that as far as certain arrangements that would need to be

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1 made, family arrangements, financial arrangements, arrangements
2 with the Bureau of Prisons and the U.S. Marshals that I would
3 need to make, because of his former position, where he would be
4 housed. I know the Court is loath to give a preview of what
5 the rulings will be, but I think we need to have a sense of
6 that before we move forward on the plea.

7 Just so I could give you, perhaps this will assist the
8 Court, my client has been under treatment through a treatment
9 provider for the last 18 months, both weekly sessions and
10 monthly sessions with the psychiatrist and an offense specific
11 counselor. I know from past experiences that going in would be
12 a break in that continuum of care which other courts have found
13 to be extraordinary circumstances in these types cases. The
14 report from Dr. Friedman, which has been previously submitted
15 to the Court, that my client does not pose a risk or is a
16 danger to the community is also an important factor for the
17 Court to consider here. He's not pleading to the mandatory
18 minimum charge, the possession charge. He's been fully
19 compliant with Pretrial Services. I have been in contact with
20 Leo Barrios, there has been no issues with him on Pretrial
21 Services.

22 The most important thing is the break in the continuum
23 of care where doctors and counselors in this area say that's a
24 very important factor to allow them to continue with that care
25 up until the time of incarceration where they can determine

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1 where the Bureau of Prisons will house them and hopefully get
2 some form of that care moving forward.

3 THE COURT: It is true that sometimes there is a
4 difference between we're not going to oppose and we consent.
5 I'm not sure if this is one of the circumstances or not. If
6 there was a change of that verbiage, Mr. Burke, I understand
7 your hesitation.

8 MR. BURKE: Whether it was consent or opposed, it was
9 that he should not be prepared to go in and that's what I
10 relied on in speaking with my client throughout the weekend in
11 preparing him for today. But nonetheless I think that the
12 grounds that I stated would permit him to remain at liberty.

13 THE COURT: The flip side of it is that it's not the
14 government's call. Even if the government thinks your client
15 should go in I could say no, he shouldn't. If the government
16 says we don't oppose or we agree with everything Mr. Burke
17 says, I could still say those aren't extraordinary reasons
18 under 3145(c).

19 MR. BURKE: This isn't a circumstance where the
20 government is saying I don't believe those rise to
21 extraordinary circumstances.

22 THE COURT: I understand.

23 (Pause)

24 THE COURT: The treatment that Mr. Fanelli's been
25 getting over the last 18 months, Mr. Burke, I understand that

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1 no treatment should be disrupted, but I guess I have two
2 questions. One is what exactly is the treatment, and second of
3 all, if there's the possibility of a prison sentence the
4 argument can be made that there's an inevitability of
5 disruption. Is it a temporal question? Is it that between now
6 and sentencing there's something crucial?

7 MR. BURKE: He's been treated for depression anxiety
8 and also treating with a counselor relating to the underlying
9 offense conduct. That treatment he's not going to be
10 receiving. And knowing from the experts in this area, they say
11 that treatment is crucial. Whether he gets that at the BOP, I
12 think that's for another day, but he'll be housed temporarily,
13 where I know he's also on a regime of medication that he would
14 not likely get by being incarcerated.

15 THE COURT: Why would he not get it? Suppose I issue
16 an order that he gets it.

17 MR. BURKE: Let me take a step back as to my client
18 being prepared today if the Court is so inclined today that I
19 haven't --

20 THE COURT: These questions are not meant to suggest
21 I'm inclined one way or the other. I didn't know this was
22 going to be an issue. I haven't had a chance to think about
23 it. Any thinking would require hearing from you in particular.

24 MR. BURKE: The point being that here, although I know
25 an order is great from the federal court, it's very often, it

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1 should be followed but the treatment providers at Westchester
2 County Jail and at MCC, they'll get the order, but they may
3 change to a different type of medication, the psychologist or
4 psychiatrist may only be there once a month so they'll say
5 we'll comply but they're not in until the end of July where he
6 could be assessed to be on a medication regime and now he's no
7 longer receiving the medication that other treatment providers
8 has said is necessary.

9 It's not just the counseling session but the
10 medication regime that is a compelling factor to allow him to
11 remain at liberty pending sentence. This is not a mandatory
12 minimum count. There is a guideline range here. But this is
13 not a mandatory minimum count where incarceration is certain.
14 So I think that's also a factor -- if it was a mandatory
15 minimum count I think I would have less of an argument here but
16 nonetheless for all of the reasons stated, he has a very strong
17 support network who are present in court today, his wife, his
18 daughter, his sister flew up from Georgia over the weekend once
19 we worked out the plea arrangement. They will remain
20 supportive.

21 But I think that this is not a case that would warrant
22 him going in when there are extraordinary circumstances that
23 we've pointed to that would be sufficient. He's been fully
24 compliant with Pretrial. He's been on strict home confinement
25 electronic monitoring, Judge, so he has been in a confined

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1 setting for lack of a better word.

2 THE COURT: Any of the medication that he's taking is
3 it meant to address physical issues as well as mental issues?

4 MR. BURKE: It's for depression and anxiety.

5 THE COURT: Okay.

6 MR. BURKE: But I know that some of the medication
7 that he's on, I know from past experience that Westchester
8 County Jail and MCC will not allow him to take.

9 THE COURT: They use substitutes.

10 MR. BURKE: I don't even know if they use substitutes.
11 They can treat depression and anxiety by other means outside of
12 what he's on now.

13 THE COURT: They're not going to ignore a court order,
14 they're not.

15 MR. BURKE: They just may apply it more slowly than
16 they should.

17 THE COURT: I will tell you, I don't have any patience
18 for that nonsense. I've had wardens here when I think that
19 that's going on. That's not going to happen. I understand
20 your concern, I understand you have some anecdotal stories, but
21 I've got my own and I just would not allow that to happen.

22 MR. BURKE: The other piece, though, as far as, had we
23 known this was going to be the position or change of position,
24 we would have been in contact with the U.S. Marshals, the
25 Bureau of Prisons. Because he can't just be housed in

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1 Westchester, we know that. I don't think he could be housed at
2 MCC, MDC. I don't know where he would be housed because of his
3 prior position as chief of police. But it's not likely in this
4 area.

5 And that's also, I'm not familiar with where he may be
6 as to having that continuum of care but I don't think it would
7 be immediate even with a federal court order to allow for that
8 without allowing us to have the opportunity to have those
9 discussions, based on what I put forth here and the
10 government's not objecting to those, that position, that
11 there's a sufficient basis to allow him to remain at liberty
12 until the time of sentencing.

13 THE COURT: Okay.

14 Did you want to say anything, Mr. Chow?

15 MR. CHOW: I would just like to add one more time that
16 the government hasn't changed its position. If consent would
17 be a better word, sure, the government is happy to consent.
18 All that happened today is the government informed defense
19 counsel that it was out of our hands and that the statutory
20 regime required the Court to make a certain finding and that
21 continues to be our position.

22 THE COURT: Okay. What the courts have said about
23 3145(c) and in particular the exceptional reasons criteria is
24 that it means a unique combination of circumstances giving rise
25 to situations that are out of the ordinary. And that's from

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1 the Second Circuit's decision in United States v. Lea, 360 F.3d
2 401, 403. Sometimes what the Circuit has said is that can
3 involve unusual legal or factual questions or sometimes even
4 substantial questions that could be sufficiently exceptional to
5 satisfy that criteria but it doesn't require any sort of legal
6 or factual novelty. And that's from DiSomma, 951 F.2d 494,
7 497.

8 On the other hand, the Circuit has also said that
9 normally purely personal circumstances don't typically rise to
10 the level of an exceptional reason. That's from Lea at 403.
11 But nonetheless what courts have done in our Circuit and
12 elsewhere is find a combination of unique facts that include
13 personal factors that could be considered exceptional so as to
14 warrant release. Sometimes they involve the survival of a
15 business. Sometimes they involve childcare. And at the end of
16 the day what the courts have said is that the "somewhat
17 amorphous standard invites a case-by-case evaluation." United
18 States from Lippold, 175 F.Supp.2d 537, 540, which means "the
19 test is necessarily a flexible one and district courts have
20 wide latitude to determine whether a particular set of
21 circumstances qualifies as exceptional." That's a direct quote
22 from the Lea decision at page 403.

23 It sounds like here the proffer is that Mr.~Fanelli
24 has been undergoing some substantial treatment that involves
25 counseling, it involves prescribed medication meant to deal

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1 with anxiety and depression and some of the case-specific
2 issues, and if he were to be remanded today or after a plea
3 that that treatment would be disrupted, the counseling sessions
4 would obviously be disrupted, and that the medication
5 provisions would at best be bumpy and at worst there would be a
6 disruption in the medication as well. And I take Mr. Burke at
7 his word that he's had cases where there have been instances
8 that the prison officials don't prescribe the medication, they
9 elect to treat other ways. That doesn't surprise me. But
10 nonetheless, I will assume that to be true.

11 And then there is the fact that Mr.~Fanelli has been
12 subject to house detention but that he's been 100 percent
13 compliant. Implicit in all that is that he's not a risk of
14 flight nor a danger. Those are not exceptional circumstances
15 obviously. Presumably that should be the norm. But it's a
16 combination of the circumstances that the Court is required to
17 consider. And I can see a sufficiently compelling case to be
18 made including the fact there's no mandatory minimum here,
19 there's no prior criminal history, there's a strong support
20 network. I think all of those are factors that probably meet
21 the standard.

22 So what do you want to do?

23 MR. BURKE: With that in mind, your Honor, I think
24 we're prepared to move forward with the plea.

25 THE COURT: All right.

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1 Mr.~Fanelli, good afternoon.

2 THE DEFENDANT: Good afternoon, your Honor.

3 THE COURT: My understanding is that pursuant to a
4 plea agreement dated July 24 of this year you're going to
5 withdraw your previously entered not guilty plea and enter a
6 plea of guilty to the third count of the indictment. Is that
7 correct?

8 THE DEFENDANT: That is correct.

9 THE COURT: Okay. Before I accept your plea I'm going
10 to be asking you a series of questions. You should know that
11 there are two reasons for these questions. One is to make sure
12 that you're pleading guilty to this charge because you are
13 guilty and you're not pleading for some other improper reason;
14 and the other is to make sure that you understand the
15 consequences of being convicted of this charge by way of a
16 guilty plea.

17 Obviously, this is a very important decision for you
18 to make, it's a decision you would not want to make or
19 otherwise follow through on unless you were 100 percent
20 comfortable. Accordingly, at any point during this proceeding
21 if you become uncomfortable because of a question you're asked,
22 because of something somebody says, and you want to speak to
23 Mr. Burke, just say so and you'll get as much time as you need
24 to talk to him. Okay?

25 THE DEFENDANT: Yes, sir.

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1 THE COURT: Are you able to understand, speak, read
2 and write English?

3 THE DEFENDANT: I am.

4 THE COURT: If you could remain standing so you could
5 take the oath, please.

6 (Defendant placed under oath)

7 BY THE COURT:

8 Q. The first thing to advise you is that now that you've taken
9 the oath, all the answers you give to the questions are subject
10 to the penalties of perjury. Perjury is intentionally lying
11 under oath about an important or material matter. If you were
12 to do that here today you could be prosecuted for the crime of
13 perjury which is separate and apart from the charge contained
14 in Count 3 of the indictment. Do you understand that?

15 A. Yes, sir.

16 Q. I'm sure Mr. Burke has gone over this with you. I just
17 want to give you a sense of how we're going to proceed. We're
18 going to start off where you are going to be asked some
19 questions about yourself. These are standard questions that
20 are asked of everybody who says that he or she wants to plead
21 guilty. And the purpose of these questions is not to
22 unnecessarily pry into your personal life but to assist in the
23 determination that you're ready, willing and able to go forward
24 today.

25 From there we're going to talk about your

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1 constitutional rights and we're going to focus on your trial
2 rights, most of which you would be giving you if you decide you
3 want to plead guilty.

4 Then we're going to talk about Count 3 in particular
5 in the indictment, what the charge alleges, and what the
6 elements or types of facts are that would have to be proven or
7 established before you could be convicted of the charge.

8 And then we're going to talk about the very important
9 subject of consequences focusing on the punishment you face if
10 convicted of this charge. We'll talk about sentencing so you
11 know how that works. We'll talk about the plea agreement.

12 And then at the end I'll ask the government to
13 summarize the proof it would offer if you elected to go to
14 trial. After that you're going to be asked how you wish to
15 plead. You can, of course, continue with your not guilty plea
16 and the case will proceed from there. But if you say you want
17 to plead guilty you're going to be asked to describe what you
18 did that makes you believe you're guilty. If you want to talk
19 to Mr. Burke for any reason whatsoever just say so and you'll
20 get as much time as you need to talk to him. We are not in a
21 hurry. Okay?

22 A. Yes.

23 Q. How old are you, sir?

24 A. 56 years old.

25 Q. How far have you gone in school?

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1 A. I have a bachelor's degree in police science.

2 Q. Are you now or have you recently been under the care of a
3 doctor or psychiatrist?

4 A. I am now.

5 Q. For the last 18 months, as Mr. Burke said?

6 A. Psychiatrist more than that. But Bruce Friedman, licensed
7 social worker, 18 months.

8 Q. And I gather you have been prescribed certain medication,
9 is that right?

10 A. Yes.

11 Q. What kind of medication are you being prescribed?

12 A. Depression medication and anxiety. Lexapro, Remeron,
13 trazodone and occasionally Lorazepam.

14 Q. And if you take those medications as prescribed, do they
15 affect your ability to think clearly?

16 A. No, they don't.

17 Q. If you don't take them, does that affect your ability to
18 think clearly?

19 A. Yes.

20 Q. Have you taken the prescribed medications in the last two
21 days?

22 A. Yes.

23 Q. Have you ever been hospitalized or treated for narcotics
24 addiction?

25 A. No, sir.

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1 Q. Have you ever been addicted to narcotics?

2 A. No, sir.

3 Q. Other than the prescribed medication that you described
4 have you taken in the last two days any other drugs, medicine,
5 pills or any alcoholic beverages?

6 A. No, sir.

7 Q. How do you feel today?

8 A. Anxious.

9 Q. Sure. And probably a little nervous. Do you feel you
10 understand fully what's going on here today?

11 A. I do.

12 THE COURT: Mr. Burke, do you agree with that?

13 MR. BURKE: I do, your Honor.

14 THE COURT: Mr. Chow, do you have any reason to doubt
15 Mr.~Fanelli's competence to go forward today?

16 MR. CHOW: No.

17 THE COURT: I agree. I find that Mr.~Fanelli is fully
18 competent to enter this plea today. That's based on my own
19 observations of Mr.~Fanelli during this proceeding, the answers
20 to the questions he's been asked thus far, and the
21 representations of able and experienced counsel.

22 Q. Have you had enough time to discuss this case with
23 Mr. Burke?

24 A. I have.

25 Q. Have you had enough time to talk to him about any possible

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1 defenses that you might raise in this case?

2 A. Yes.

3 Q. Including the legal issues that we have been discussing for
4 sometime. You've had enough time to talk to him about those
5 issues?

6 A. Yes.

7 Q. To date are you satisfied with Mr. Burke's representation
8 of you?

9 A. I am satisfied.

10 THE COURT: The next thing we're going to discuss is
11 the subject of your constitutional rights. Mr. Burke, do you
12 have the advice of rights form there?

13 MR. BURKE: I do, as amended.

14 Q. Mr.~Fanelli, do you recognize that document?

15 A. Yes, your Honor, I do.

16 Q. Did you go over that document very carefully with
17 Mr. Burke?

18 A. Yes, your Honor.

19 Q. Did he answer any questions you had about it to your
20 satisfaction?

21 A. Yes, he did.

22 Q. Did you sign it?

23 A. Yes, I did.

24 THE COURT: Mr. Burke, you signed it as amended?

25 MR. BURKE: Yes.

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1 THE COURT: Before you and your client signed this
2 document, you went over it carefully with him?

3 MR. BURKE: Yes, I did.

4 THE COURT: He'll mark this as Court's Exhibit 1.

5 Q. Much of what we're going to discuss is duplicative of
6 what's in this document, but the subject of your constitutional
7 rights is obviously very important so I do ask that you pay
8 careful attention as we go over your rights.

9 Under the laws and Constitution of the United States
10 you are entitled to a speedy and public trial before a jury if
11 you would like or a judge on all the charges that have been
12 brought against you. Do you understand that?

13 A. Yes, I do.

14 Q. At the trial before you could be found guilty it would be
15 government's burden of proving your guilt beyond a reasonable
16 doubt and you would not have the burden of proving your
17 innocence. Do you understand that?

18 A. Yes, your Honor.

19 Q. If the case were tried before a jury, before the jury could
20 return a guilty verdict all twelve jurors would have to be
21 satisfied that the government met its burden of proving your
22 guilt beyond a reasonable doubt and again you would not have to
23 prove your innocence. Do you understand that?

24 A. Yes, your Honor.

25 Q. At the trial and at every stage of this case, you have a

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1 constitutional right to be represented by an attorney, and if
2 you could not afford an attorney, one would be provided for you
3 at public expense. Do you understand?

4 A. Yes, your Honor.

5 Q. During a trial you would have the right with the assistance
6 of Mr. Burke to confront and cross-examine the witnesses
7 against you; also Mr. Burke could object to evidence he doesn't
8 think the government should be allowed to introduce; he could
9 offer evidence on your behalf; and he could even force people
10 to testify on your behalf through the use of the Court's
11 subpoena power. Do you understand?

12 A. Yes, your Honor.

13 Q. At a trial, although you would have the right to testify if
14 you wanted to, you would also have the right not to testify,
15 and you would have the right not to have that choice held
16 against you in any way whatsoever. Do you understand that?

17 A. Yes, your Honor.

18 Q. If you were convicted after a trial you would have the
19 right to appeal the guilty verdict. Do you understand that?

20 A. Yes, your Honor.

21 Q. Even now as you're entering this plea you have the right to
22 change your mind, continue with your not guilty plea, and go to
23 trial on all the charges that have been brought against you.

24 Do you understand?

25 A. Yes.

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1 Q. If you plead guilty and I accept your plea, you're going to
2 give up your right to a trial and the other rights which we
3 just discussed other than your right to an attorney. Do you
4 understand?

5 A. Yes.

6 Q. If you plead guilty and if I accept your plea that means
7 there will be no trial and I will enter a judgment of guilty
8 and I will impose sentence after considering what's known as a
9 presentence report and all the arguments on behalf of Mr. Burke
10 and all the arguments of Mr. Chow or one of his colleagues. Do
11 you understand that?

12 A. Yes.

13 Q. Finally, if you plead guilty you will have to give up your
14 right not to incriminate yourself because you're going to have
15 to discuss what you did that makes you believe you're guilty,
16 in other words, admit and acknowledge your guilt. Do you
17 understand that?

18 A. Yes, your Honor.

19 Q. The next thing we're going to discuss is the indictment and
20 in particular Count 3 of the indictment. Have you been given a
21 copy of the indictment or otherwise gone over it with
22 Mr. Burke?

23 A. Yes, I have.

24 Q. Did he answer any questions about the indictment that you
25 had?

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1 A. Yes, he did, your Honor.

2 Q. Do you understand what the charges are that have been
3 brought against you?

4 A. I do.

5 Q. In particular, Count 3 alleges that on or about January 3
6 of 2014 that you knowingly, in the Southern District of New
7 York and elsewhere, that you knowingly possessed and accessed
8 with intent to view certain materials that were mailed, shipped
9 or transported using a means and facility of interstate and
10 foreign commerce, and in and affecting interstate and foreign
11 commerce. In particular, it's alleged that you possessed in
12 your residence in Westchester County images of child
13 pornography that you downloaded from the Internet. Do you
14 understand that that's the count in charge 3? Do you
15 understand that that's the charge?

16 A. Yes, your Honor, I do.

17 Q. Are you okay?

18 A. Yes.

19 THE COURT: You should know that this charge is
20 brought pursuant to Title 18 United States Code Section
21 22A(a)(5)(B) and (b)(2).

22 Also we're going over the forfeiture allegations, is
23 that right, Mr. Chow?

24 MR. CHOW: There is a forfeiture allegation.

25 Q. Separate from this document, Mr.~Fanelli, there is what's

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1 known as the forfeiture allegation. What this says is that if
2 convicted you could be required to forfeit the following to the
3 United States Government: Any visual depictions that are
4 described in Title 18 United States Code Section 2251, 2251A or
5 2252, as well as any material, whether it's a book, magazine,
6 etc., which was produced, transported, mailed, shipped or
7 received in violation of Title 18 United States Code, Chapter
8 110. Also, any property, real and personal, that constitutes
9 or is traceable to gross profits or other proceeds obtained
10 from the offense conduct and any property that was used or
11 intended to be used to commit or to promote the commission of
12 the offense conduct. Do you understand that that's the type of
13 property you could be required to forfeit if convicted of Count
14 3?

15 A. Yes, your Honor.

16 Q. Also, if that property couldn't be found, then the
17 government would reserve the right to forfeit from you a
18 substitute asset, so something of equal value. Do you
19 understand that?

20 A. Yes.

21 THE COURT: Mr. Chow, what are the elements that have
22 to be proven or established before Mr.~Fanelli can be convicted
23 of the third count?

24 MR. CHOW: In order to prove the defendant guilty of
25 Count 3 of the indictment, the government would have to prove

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1 each of the following elements beyond a reasonable doubt:

2 First, that the defendant knowingly possessed materials that
3 contained at least one image of child pornography; second, that
4 such image or images contained in the materials had been
5 transported in interstate or foreign commerce, including by
6 computer, or that such image or images had been produced using
7 materials that had been mailed or shipped or transported in
8 interstate or foreign commerce by any means including by
9 computer; and third, that at the time of such possession, the
10 defendant believed that such image or images contained in the
11 materials constituted child pornography.

12 In order to establish venue the government would have
13 to prove by a preponderance of the evidence that venue is
14 proper in the Southern District of New York.

15 Q. Did you follow what Mr. Chow said, Mr.~Fanelli, about the
16 elements that would have to be proven or established before you
17 could be convicted of this charge?

18 A. Yes, your Honor.

19 Q. Now, the next thing we're going to discuss is the subject
20 of consequences and we're going to start off by talking about
21 the sentence you could get if convicted of this offense
22 conduct. Before we go over that information, what I want to
23 stress to you is that as we're here today, I do not know what
24 your sentence will be in this case. And the reason I do not
25 know is because I've had no reason to think about what sentence

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1 you might receive, because as of this very moment you have been
2 convicted of nothing. So what we're going to go over is not
3 what your sentence will be but what it can be, that is, the
4 maximum it can be under laws passed by Congress. The idea in
5 going over this information is not to hint or suggest to you
6 what your sentence will or will not be, but to make sure that
7 you are fully informed as to what it can be if you decide you
8 what to plead guilty. Do you understand that?

9 A. Yes.

10 Q. If convicted of Count 3, you face a maximum of ten years
11 imprisonment. Do you understand that?

12 A. Yes, sir.

13 Q. You face a maximum of three years supervised release. Do
14 you understand that?

15 A. Yes, sir.

16 Q. The fine you face is the greatest of three numbers,
17 \$250,000, or twice the financial gain to you as a result of the
18 offense conduct, or twice the financial loss to anybody else as
19 a result of the offense conduct. Do you understand that?

20 A. Yes, your Honor.

21 Q. You also face what's called a special assessment. It's
22 like a fine, and here it has to be one hundred dollars, I have
23 no choice in that regard. Do you understand that?

24 A. Yes.

25 Q. Also, you could be ordered to make restitution, to

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1 financially compensate any victims of the offense conduct. Do
2 you understand that?

3 A. Yes.

4 Q. Then you also face the possibility of forfeiture as we just
5 went over regarding the forfeiture allegations in the
6 indictment. Do you understand that?

7 A. Yes, your Honor.

8 Q. I mentioned that you face a maximum of three years
9 supervised release, Mr.~Fanelli. I want to make sure you
10 understand what supervised release is and that you also
11 understand a very important aspect of supervised release. As
12 the phrase implies, supervised release is the portion of the
13 sentence where you would be released from prison but subject to
14 the supervision of the U.S. Probation Office. The reason you
15 would be subject to the Probation Office's supervision is that
16 while you're facing that portion of your sentence, you would be
17 subject to certain terms and conditions, basically rules.

18 Again, I don't know what your sentence will be so I don't know
19 what terms and conditions will be imposed in your case, but for
20 example, by law everybody who is serving a supervised release
21 portion of a sentence has to live by the condition that he or
22 she not break any other laws as well as not possess any drugs
23 or any guns. And there are a bunch of other conditions that
24 are imposed at the time of sentence. Do you understand that?

25 A. Yes, your Honor.

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1 Q. The important piece of this you should know is that if you
2 violate any of these terms and conditions, if you break any of
3 these rules, then you can go back to jail for up to the amount
4 of supervised release time to which you were originally
5 sentenced, do you understand that?

6 A. Yes, your Honor.

7 Q. Let me give you an example just so it's clear but stressing
8 again not to read into this example as a suggestion or hint as
9 to what your sentence will be. Let's say you get sentenced to
10 some term of imprisonment and let's say you get sentenced to
11 three years of supervised release and let's say that during the
12 first two years there are no violations but in the last year
13 you get caught breaking a state law, that is, you commit a
14 violation. Then, in this example, you could go back to jail
15 for up to three years because that was the supervised release
16 term that was imposed, meaning you don't get credit for time
17 you served in jail before supervised release started and you
18 don't get credit for the time that you were on supervised
19 release and not committing any violations. Do you understand
20 that?

21 A. Yes, your Honor.

22 Q. Are you a citizen of the United States?

23 A. Yes, sir.

24 Q. Are you a citizen of any other country?

25 A. No, sir.

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1 Q. There are some things we should go over with respect to
2 sentencing but before we do that, if you're convicted of the
3 third count, because that's a felony, you also face some other
4 consequences. In particular, you could be deprived of certain
5 civil rights which might include the right to vote, the right
6 to hold public office, the right to serve on a jury, the right
7 to possess a firearm, the right to be considered for certain
8 types of employment or to be bonded or to serve in the U.S.
9 military, as well as the right to obtain and possess certain
10 government-issued licenses including licenses that might be
11 necessary for certain professions and occupations. Do you
12 understand that?

13 A. Yes, your Honor.

14 Q. The other thing you should know is that if convicted of the
15 third count, you could be subject to certain requirements under
16 the Sex Offender Registration and Notification Act which would
17 require you as a matter of federal law to register and keep
18 current your registration in each jurisdiction where you would
19 live, where you would work, or you would study. Do you
20 understand that?

21 A. Yes, your Honor.

22 Q. To you need a break?

23 A. No, sir. I'm ready to go.

24 Q. If you need a break, just say so, okay, Mr.~Fanelli.

25 With respect to sentencing there are some things that

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1 you should know. The first thing is the determination as to
2 what your sentence will be is to be made solely by the Court.
3 Do you understand that?

4 A. Yes, your Honor.

5 THE COURT: Mr. Burke, I think we should take a small
6 break. Is that okay?

7 MR. BURKE: That's fine.

8 THE COURT: Let's take five minutes.

9 (Recess)

10 MR. BURKE: Thank you for that time. We're prepared
11 to move forward.

12 THE COURT: Mr.~Fanelli, if you want to take a break,
13 just let me know.

14 Q. I think we left off we were talking about sentencing. The
15 first thing I want to let you know is that the determination as
16 to what your sentence will be in this case is solely my
17 decision. I will, of course, consider anything Mr. Burke says
18 on your behalf, anything the prosecutors say on the
19 government's behalf, but I'm not bound to follow what either
20 one of them says. Do you understand that?

21 A. Yes, sir.

22 Q. The second thing you should understand is that regardless
23 of what happens at sentencing, the sentence you receive will
24 not be a basis for you to withdraw or undo or somehow take back
25 your plea once it's entered and received. Do you understand

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1 that?

2 A. Yes, I do.

3 Q. You have a right to appeal the sentence and there's some
4 waivers that we'll go over in a minute, but you haven't waived
5 your right to appeal any sentence the Court imposes. So if
6 there's a sentence that the Court imposes and you haven't
7 waived your right to appeal the sentence, even if the appellate
8 court agrees that the sentence was illegal, all that would
9 happen is you would be re-sentenced, you would not get your
10 plea back. Do you understand?

11 A. Yes, sir.

12 Q. Just so you understand the mechanics of sentencing, at
13 sentencing it's going to be my job to determine what sentence
14 is sufficient but no more than necessary to achieve the goals
15 of the sentencing laws as they apply to you and to this case.
16 Do you understand that?

17 A. Yes, sir.

18 Q. To do that I'm going to be required to consider certain
19 factors, they're called, and they're all set forth in a statute
20 passed by Congress. They includes facts having to do with your
21 personal history, your story, facts having to do with the
22 offense conduct and other factors including something known as
23 the Sentencing Guidelines. The guidelines are an attempt to
24 calculate a range of imprisonment that applies to your case.
25 Because there's a range, there's a low end, there's a high end,

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1 it's calculated in months, it takes into consideration certain
2 facts regarding the offense conduct, the criminal history of
3 the person being sentenced or lack of criminal history. The
4 guidelines are only among the factors that require
5 consideration. They don't set the boundary of the sentence,
6 meaning that if after considering all of the things I'm
7 required to consider, the sentence that I decide is a fair
8 sentence happens to be within the guidelines, then yes, I can
9 impose that sentence; but if it turns out the sentence I think
10 is appropriate is outside the guidelines, whether it's below or
11 above the guidelines, I can impose that sentence but I just
12 can't go past the ten-year statutory maximum. Do you
13 understand that?

14 A. Yes, I do.

15 Q. Now, has anybody threatened you or forced you in any way to
16 enter your plea here today?

17 A. No, your Honor.

18 Q. My understanding is that you're pleading guilty pursuant to
19 an agreement you have with the government that's dated July
20 24th of this year. Is that right?

21 A. It is right, your Honor.

22 THE COURT: Mr. Burke, do you have the original
23 agreement there?

24 MR. BURKE: I have a copy. The government has the
25 original.

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1 THE COURT: Can we pass the original over to
2 Mr. Burke, Mr. Chow.

3 (Handed to counsel)

4 Q. Mr. Fanelli, if you could take a look at that document, do
5 you recognize it?

6 A. Yes, your Honor. And I signed it.

7 Q. Before you signed it, did you go over this document very
8 carefully with Mr. Burke?

9 A. I did.

10 Q. Did he answer any questions you had about it to your
11 satisfaction?

12 A. He did.

13 Q. Did you sign the last page?

14 A. I did, your Honor.

15 THE COURT: Mr. Burke, did you sign immediately
16 beneath your client?

17 MR. BURKE: I did.

18 THE COURT: Before you or your client signed this
19 document, you went over it carefully with him?

20 MR. BURKE: I did.

21 THE COURT: We'll mark that as Court's Exhibit 2. And
22 I'll let the government hang onto the original.

23 Q. You and Mr. Burke say you've gone over this document and I
24 have no reason to doubt that. There are some things that I do
25 want to highlight about it. The first thing is, understand

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1 that this is a contract. It may look like a letter, at least
2 on the first page, but this is a contract that you have with
3 the United States Attorney's Office. Do you understand that?

4 A. Yes, I do.

5 Q. That's the purpose to having you and your attorney and the
6 government's attorney sign this document. However, I did not
7 sign this document so this document is only binding on you and
8 the government. It's not binding on anybody else including
9 myself. Do you understand that?

10 A. Yes, your Honor.

11 Q. Now, in this agreement at pages 2 and 3, you and the
12 government have a discussion there about the sentencing
13 guideline range and the result of that discussion is at page 3
14 under (c) sentencing range. You and the government have agreed
15 to a so-called stipulated guideline range of 41 to 51 months
16 imprisonment. Do you see that there?

17 A. Yes, your Honor.

18 Q. First, again, this is only between you and the government.
19 I'm not required to agree with you all that that is the
20 applicable guideline range. Do you understand that?

21 A. Yes, your Honor.

22 Q. Even if that is the guideline range or whatever the
23 guideline range is, remember what we talked about a few minutes
24 ago, I'm not required to impose a sentence within the guideline
25 range. I can impose a sentence within the range or if I think

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1 it's appropriate I can impose a sentence that falls outside the
2 range whether above or below the range. Do you understand
3 that?

4 A. Yes, your Honor.

5 Q. At page 4, the third full paragraph, that long paragraph
6 there, at the beginning part of that paragraph what it says is
7 you've agreed you will not appeal or legally challenge,
8 including by way of a *habeas corpus* petition, or otherwise seek
9 a sentence modification of any sentence that is within or below
10 the stipulated guideline range. Meaning, if I impose a
11 sentence between zero and 51 months then you have waived your
12 right to object to that sentence by way of appeal or *habeas*
13 *corpus* petition or any other way. Do you understand that?

14 A. Yes.

15 Q. You have preserved your right to appeal any sentence above
16 51 months. But even if I were to impose such a sentence and
17 even if you successfully appealed it, you would not get your
18 plea back, you would just get resentenced. Do you understand
19 that?

20 A. Yes.

21 Q. The next paragraph says you're accepting the agreement and
22 deciding to plead guilty because you are guilty, and by
23 entering the guilty plea you're waiving any right you have to
24 withdraw your plea or legally challenge any conviction
25 resulting from the plea, based on the claim that the government

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1 failed to produce certain discovery material. And there's a
2 reference there to the *Jencks Act* and to two Supreme Court
3 cases. Do you see that?

4 A. Yes, your Honor.

5 Q. The *Jencks Act* is a federal statute that requires federal
6 prosecutors to turn over to the defendant the prior written or
7 recorded statements of the government's witnesses that relate
8 to the subject matter of the government witness' testimony. Do
9 you understand that?

10 A. Yes.

11 Q. The *Brady* case is where the Supreme Court said that anybody
12 charged with a crime has a right under the due process clause
13 to be provided by the prosecutor with exculpatory evidence or
14 information that could lead to exculpatory evidence that's part
15 of the prosecutor team's file. Do you understand that?

16 A. Yes.

17 Q. *Giglio* is where the Supreme Court said that anybody charged
18 with a crime has a due process right to be provided by the
19 prosecutor with any information that could be used to attack
20 the credibility of the government's witnesses. Do you
21 understand that?

22 A. Yes.

23 Q. Unless the government has failed to produce discovery that
24 actually establishes your innocence, the government's otherwise
25 failure to provide with its obligations under the *Jencks Act*

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1 and consistent with those two Supreme Court cases will not be a
2 basis for you to take back your plea or legally challenge any
3 conviction resulting from the plea. Do you understand that?

4 A. Yes.

5 Q. There's a couple of other provisions here in this
6 agreement. The last paragraph on page 1 and going on to page 2
7 talks about the property that you've agreed to forfeit, and
8 this includes a computer containing hard drives with certain
9 serial numbers. Do you see that there?

10 A. Yes, I do.

11 THE COURT: And then the agreement also has on page 5
12 the registration requirement that we've already discussed. Is
13 there anything else, Mr. Burke, you think I should go over with
14 your client regarding the terms of the agreement?

15 MR. BURKE: No, your Honor. The only additional point
16 that's new in the government's agreement is not waiving the
17 ineffective assistance. I think you've addressed that he's
18 satisfied with the assistance provided to date. But now we see
19 in the plea agreements the bottom of the waiver paragraph,
20 where they said, notwithstanding the foregoing, nothing in this
21 paragraph shall be construed as a waiver of the right of the
22 defendant to assert a claim of ineffective assistance of
23 counsel, whether on direct appeal, collateral review, or
24 otherwise.

25 Q. The last sentence there, Mr. Fanelli, says, the last

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1 sentence of the third paragraph on page 4 says: "Nothing in
2 this paragraph shall be construed to be a waiver of whatever
3 rights the defendant may have to assert claims of ineffective
4 assistance of counsel whether on direct appeal, collateral
5 review or otherwise. Rather, it is expressly agreed that the
6 defendant reserves those rights." So the rights are not
7 clearly explained there, but whatever right you might have to
8 challenge the effective assistance of counsel that you got from
9 Mr. Burke here, you would preserve those rights, this agreement
10 notwithstanding. Do you understand that?

11 A. Yes, I do.

12 THE COURT: Thank you for bringing that to my
13 attention, Mr. Burke. Anything else, Mr. Burke, with respect
14 to the agreement?

15 MR. BURKE: No.

16 THE COURT: Mr. Chow, anything with respect to the
17 agreement?

18 MR. CHOW: Nothing in addition, Judge.

19 Q. Mr.~Fanelli, has anybody made you any promises other than
20 what's in that agreement to get you to plead guilty?

21 A. No, sir.

22 Q. Has anybody promised you what sentence you would receive if
23 you plead guilty?

24 A. No, sir.

25 THE COURT: Mr. Chow, if you could summarize the proof

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1 the government would offer if Mr.~Fanelli elected to go to
2 trial.

3 MR. CHOW: The government's proof at trial would
4 include materials referenced in the criminal complaint in this
5 case, such as law enforcement testimony that they were able to
6 identify the defendant's IP address as one that had made over
7 100 files believed to contain images of child pornography
8 available for download through a file-sharing program called
9 Ares. Law enforcement testimony would also show that they were
10 able to download three files that contained images of child
11 pornography directly from the defendant's computer through
12 Ares. The proof would also include testimony of statements
13 made by the defendant wherein he admitted to using the
14 file-sharing program Ares to access child pornography.

15 Q. Mr.~Fanelli, what Mr. Chow has done is summarize the proof
16 that the government would offer if you elected to go to trial.
17 Did you follow what he said?

18 A. Yes, I did.

19 Q. How do you wish to plead to Count 3 of the indictment,
20 guilty or not guilty?

21 A. Your Honor, I plead guilty to Count 3 of the indictment.

22 Q. If you could describe what you did that makes you believe
23 you're guilty of Count 3.

24 A. Your Honor, on or about January 3, 2014 I did, on multiple
25 occasions, use the Ares peer-to-peer network to possess child

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1 pornography. I know what I did was wrong and against the law.
2 I'm truly sorry for the harm that I have caused, especially to
3 the victims, in this case, but also to my family, my police
4 department, where I had worked for so many years, and to the
5 government.

6 Q. And in what town did this happen, Mr.~Fanelli?

7 A. Where I worked? Oh, Mahopac, New York. Putnam County.

8 Q. That's where you downloaded the material, is that right?

9 A. That's correct, your Honor.

10 THE COURT: Mr. Burke, I take it there's no contest to
11 the interstate component of this.

12 MR. BURKE: No, your Honor. Nor venue.

13 Q. Mr.~Fanelli, you understood what you were doing was
14 illegal?

15 A. Yes, your Honor.

16 THE COURT: Anything else by way of allocution,
17 Mr. Chow?

18 MR. CHOW: I believe the defendant used the word
19 access. I just wanted to make clear that he possessed
20 materials.

21 Q. By accessing it, did it give you possession or at least the
22 ability to possess the materials, Mr.~Fanelli?

23 A. I believe I said possess, but if I did not, possess.

24 THE COURT: Anything else, Mr. Chow?

25 MR. CHOW: Nothing further, your Honor.

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1 THE COURT: Anything else, Mr. Burke?

2 MR. BURKE: No, your Honor.

3 Q. Mr.~Fanelli are you pleading guilty to this charge because
4 you are guilty?

5 A. Yes, your Honor.

6 THE COURT: Mr. Burke, do you agree that there's a
7 sufficient legal and factual basis to accept the plea?

8 MR. BURKE: I do.

9 THE COURT: Mr. Chow?

10 MR. CHOW: Yes, your Honor.

11 THE COURT: I agree. Because Mr.~Fanelli has been
12 advised of his rights, because he's been advised of the charge
13 in Count 3, the elements of the charge and the consequences if
14 convicted of the charge, and because Mr.~Fanelli has been found
15 to be competent to enter this plea and he's acknowledged that
16 he's guilty as charged in Count 3, the Court finds that
17 Mr.~Fanelli has knowingly and voluntarily entered this plea and
18 the Court will accept the plea and enter a judgment of guilty.

19 Can we set sentencing for how far out, Mr. Burke?

20 MR. BURKE: I was going to suggest a date in November.
21 I think that should provide Probation ample time.

22 THE COURTROOM DEPUTY: November 12, ten o'clock.

23 THE COURT: Here's what's going to happen,
24 Mr.~Fanelli. The Probation Department is going to prepare this
25 presentence report that I referenced briefly during the

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1 allocation. The purpose of the report is to provide as much
2 information as is practical under the circumstances about you
3 and about the offense conduct. To prepare this report the
4 Probation Department will conduct its own inquiry which means
5 they'll go talk to the government about the offense conduct
6 mostly and they'll talk to you. And I'll note that Mr. Burke
7 wants to be present when they do talk to you. They're going to
8 talk to you about everything including your personal history,
9 including family, medical, education, employment. Answer those
10 questions that Mr. Burke says you can answer, because there may
11 be valid legal reasons why he's not going to want you to answer
12 those questions. Please make sure that whenever you do answer
13 the Probation Department's questions you answer them
14 truthfully. You obviously don't want them to report that
15 you're dishonest. But also because you know more about
16 yourself than anybody and it's in your interest that this
17 report be as accurate as it can be especially about yourself.
18 You have every reason to be honest with them. Before a final
19 report is distributed they'll give a draft to Mr. Burke, he'll
20 go over it with you. Please let him know if there's anything
21 in the report that is inaccurate so he can try to get the
22 Probation Department to fix it.

23 With respect to bail, is there anything else you'd
24 like to add to what's already been said, Mr. Burke?

25 MR. BURKE: No. I would reserve if necessary, but I'm

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1 not going to add anything further based on our prior colloquy.

2 THE COURT: The one thing that you sort of alluded to
3 that I think might merit some discussion is the combination of
4 the work that Mr.~Fanelli has done being in law enforcement and
5 the nature of the charge of conviction here might make him
6 being remanded locally problematic, including in particular
7 Westchester County jails. One of two things would happen. He
8 would be housed somewhere else or he would be put in solitary,
9 which would complicate, no doubt, the treatment issues that
10 you've raised.

11 MR. BURKE: Yes, your Honor. And a long while back we
12 represented a police officer, two of them, not the same type
13 conduct, but nonetheless one was housed in Texas, the other was
14 in Kansas.

15 THE COURT: Pending appeal?

16 MR. BURKE: This is a long time ago. Some were on
17 remand, and one was my father's case a long time ago, and he
18 was in La Tuna, Texas. My client went to Kansas. Some were
19 pending appeal, some were when he was remanded. He had other
20 issues elsewhere. That obviously complicated things for the
21 presentence interview. But I do think that if he was in some
22 kind of protective custody or solitary that his treatment would
23 be severely limited and I'm almost certain that he would not be
24 housed here or in New York. So that would also complicate
25 probation or any other kind of treatment that he received.

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1 THE COURT: I already went through what the law is but
2 focusing especially on what the Second Circuit said that the
3 test under 3145(c) is a flexible test and there's wide latitude
4 to determine whether or not a particular set of circumstances
5 is exceptional. The Court's finding is that there are a set of
6 circumstances that are exceptional and they are the combination
7 of the following.

8 In terms of some basic facts, Mr.~Fanelli has been
9 fully compliant with the conditions of his bail thus far. He's
10 been subject to house detention without any incident. He's not
11 likely to flee, it's the Court's finding, or present a danger.
12 Those are not by themselves exceptional because those should be
13 normal, but that weighs in Mr.~Fanelli's favor here. Added to
14 that is the strong family support that he received which adds
15 further to the finding that he's not a risk of flight or a
16 danger.

17 The offense of conviction, the conduct
18 notwithstanding, there's also the treatment that Mr.~Fanelli
19 has been receiving for some time that includes both therapy
20 sessions as well as medication. The former would be disrupted
21 completely. The latter could be certainly interrupted, it
22 would potentially be complicated depending on where Mr.~Fanelli
23 would be housed, which is another fact that's complicated here
24 because of Mr.~Fanelli's work as a law enforcement official and
25 given the nature of the offense conduct housing him pending

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1 sentence would be complicated. He may not be housed here
2 locally and that would obviously affect sentencing preparation
3 but more importantly it would affect his ability to continue
4 the treatment, it would separate him from his family and that
5 would even be more complicated if he were housed somewhere in
6 the New York Metropolitan area but subject to some protective
7 custody or solitary confinement. And all indications are that
8 this treatment Mr.~Fanelli has been important and helpful to
9 him.

10 The combination of those conditions plus the fact that
11 he's not facing the mandatory minimum, as Mr. Burke points out,
12 that means that the disruption of the treatment is not
13 inevitable, we'll see what the sentence is, at least there's no
14 mandatory minimum.

15 That set of circumstances the Court finds exceptional,
16 so therefore grants Mr.~Fanelli's application for bail pending
17 sentence which we've set for November.

18 All of that being said, Mr.~Fanelli, I want to advise
19 you that it is a separate crime for you to fail to appear at a
20 court conference or date that's been set, or obviously, if you
21 violate the conditions of your bail, that could result in your
22 remand. Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Mr. Burke, is there anything else?

25 MR. BURKE: No, thank you, your Honor.

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1 THE COURT: Mr. Chow, is there anything else?

2 MR. CHOW: Nothing further from the government.

3 THE COURT: Then we're adjourned. Thank you.

4 (Proceedings adjourned)

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